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Supreme Court, U.S.
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No. 04-1739

IN THE

# Supreme Court of the United States

JEFFREY BEARD,

*Petitioner,*

REPRINTED COPY

*v.*

RONALD BANKS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF FOR LUMUMBA KENYATTA INCUMAA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether a state is entitled to summary judgment upholding a prison policy that denies newspapers, magazines, and photographs to certain inmates, where the state: (1) baldly asserts that the policy will deter certain inmates from violating prison rules, will prevent fire, will reduce contraband, and will increase security; (2) fails to articulate any valid and rational connection between the policy and its asserted justification; and (3) fails to submit any evidence to establish that the policy actually furthers these interests.

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## INTEREST OF MR. INCUMAA[1]

Lumumba Kenyatta Incumaa, an inmate incarcerated in South Carolina state prison, is the plaintiff in *Incumaa v. Ozmint*, pending before the United States Court of Appeals for the Fourth Circuit.[2] On August 29, 2003, Mr. Incumaa, *pro se*, filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of South Carolina against Jon Ozmint, in his official capacity as Director of the South Carolina Department of Corrections ("the Director"). Mr. Incumaa has challenged South Carolina Department of Corrections Policy/ Procedure OP-22.11:

> **13.1** MSU inmates may continue to receive periodical subscriptions that were purchased and paid for prior to their admission to MSU until the subscription expires, but will only be allowed to have in their possession the number of paperback books or periodicals authorized in paragraph 14, below. ***No subscriptions may be renewed.***
>
> **13.2** ***No new periodical subscriptions or purchases of books, publications, or magazines will be approved after the inmate's admission to MSU. MSU inmates will not be allowed to receive any free books, periodicals, publications, or magazines in their correspondence.***

OP-22.11 (emphases in original). Specifically, Mr. Incumaa claims that this policy, which substantially bars inmates housed

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1. Neither party in this case nor their counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* and his counsel made any monetary contribution to its preparation or submission. The parties' written consent, pursuant to Supreme Court Rule 37, is attached hereto.

2. Docket No. 04-7824.

in that state's "Maximum Security Unit" from receiving books, magazines, or other publications in the mail, violates the First and Fourteenth Amendments to the United States Constitution.

On October 26, 2004, the district court granted the Director's motion for summary judgment, based on arguments similar to those advanced by the Petitioner here.[3] Mr. Incumaa appealed.

On April 15, 2005, the Fourth Circuit appointed undersigned counsel to represent Mr. Incumaa. Mr. Incumaa has submitted his opening brief in the Fourth Circuit.

## STATEMENT OF THE CASE

Inmates in the Long Term Segregation Unit ("LTSU") "Level 2" of the Pennsylvania Department of Corrections ("DOC") are subject to a "total prohibition" on possession of "secular newspapers or magazines." Joint Appendix ("J.A.") at 26-27. They have "no access to the newspapers and magazines in the prison library." *Id.* "Nor can they receive news clippings or articles in the mail unless they have a personal nexus" to the inmate. *Id.* All LTSU inmates are also prohibited from possessing photographs of family members or loved ones. *Id.*

On October 18, 2001, Ronald Banks ("Mr. Banks" or "Respondent"), a Level 2 LTSU inmate, sued Jeffrey Beard, in his official capacity as Secretary of the DOC ("DOC" or "Petitioner"), seeking injunctive and declaratory relief under 42 U.S.C. § 1983. J.A. at 1. Mr. Banks claimed that the ban on newspapers, magazines, and photographs violates the Free Speech Clause of the First Amendment to the United States Constitution. *Id.* at 17.

3. In several respects not discussed here, OP-22.11 is more restrictive, both on its face and as applied to Mr. Incumaa, than the prohibition at issue here.

According to DOC, the "primary, most important purpose" of the ban on newspapers, magazines, and photographs is "behavior motivation." *Id.* at 27. In other words, "it provides the Level 2 inmates with the prospect of earning a privilege" and serves as a deterrent to inmates outside of Level 2 who are not subject to the prohibition. *Id.* A "secondary purpose," officials explain, is that if inmates have "less property," it is "easier . . . for the unit's correctional officer to detect concealed contraband." *Id.* Finally, officials assert that "newspapers and magazines can be used as weapons, . . . or employed as tools to catapult feces at the guards without the necessity of soiling ones own hands and as tinder for cell fires." *Id.*

Following class certification and discovery,[4] the parties cross-moved for summary judgment. *Id.* at 4. The district court granted summary judgment in favor of DOC, holding that the prohibitions were rationally related to DOC's penological interests in rehabilitation and security. *Banks v. Beard*, 399 F.3d 134, 138 (3d Cir. 2005).

Mr. Banks then appealed to the United States Court of Appeals for the Third Circuit. J.A. at 7. The Third Circuit analyzed Mr. Banks's claims under the framework set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987), which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *See Banks*, 399 F.3d at 139-48. This test weighs four factors: (1) the validity and rationality of the connection between the restriction and the asserted penological interest; (2) the availability of

4. The district court certified a class comprising all prisoners within the Western District of Pennsylvania who are or will be confined within Level 2 of the LTSU. J.A. at 3.

alternative means for exercising the implicated right; (3) the impact of accommodating that right; and (4) the existence of obvious alternatives for achieving the asserted penological goal. *Turner*, 482 U.S. at 89-90.

With respect to the first factor, the Third Circuit agreed generally that "[c]ertainly 'deterrence of future infractions of prison rules' is a legitimate penological interest." *Banks*, 399 F.3d at 140. It concluded, however, that the behavioral modification justification offered by DOC was "illogical given the nature of LTSU confinement." *Id.* at 141. The court next concluded that DOC's fire, contraband, and security justifications were also unsupported by common sense or evidence. *Id.* at 142-44.

The Third Circuit then examined the other *Turner* factors and determined that each of them supported the claims by Mr. Banks. *Id.* at 144-48. Justice Alito, then sitting on the United States Court of Appeals for the Third Circuit, dissented, arguing that the majority had placed an improper evidentiary burden on the government. *See id.* at 148-50. But the majority countered that its evidentiary inquiry was a complementary part of its *Turner* analysis:

> [O]ur insistence that the DOC offer some evidence is not, in our view, at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation. *See Turner*, 482 U.S. at 89 (requiring prison authorities to put forward a legitimate governmental interest justifying the regulation). Indeed, in *Turner*, the Supreme Court evaluated the evidence in determining whether the prison rules in question served - in theory or in practice - the alleged

> penological goals. *See id.* at 91-93, 98-99. In our view, the paucity of any such evidence in this matter reinforces the conclusion that there is no valid, rational connection between the DOC rule and its stated rehabilitative purpose.

*Banks*, 399 F.3d at 142 n.10. Based on this analysis, the Third Circuit reversed the district court's grant of summary judgment for DOC and remanded the case for further proceedings. *Id.* at 148.

## SUMMARY OF ARGUMENT

DOC's assertion of entitlement to deference from this Court begins rather than ends the central inquiry in this case. Indeed, no one disputes that federal courts should "accord substantial deference to the professional judgment of prison administrators." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). However, courts must balance this deference with the need to protect prisoners' constitutional rights under a standard that "is not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *see Washington v. Harper*, 494 U.S. 210, 223 (1990) (discussing "need to reconcile" protection of prisoners' rights with need for deference). In this case, the Court must decide the proper allocation of burdens where, as here, the government has made a motion for summary judgment without any evidentiary support for the nexus between its penological justifications and its restrictions on prisoners' constitutional rights. The Third Circuit concluded that, under those circumstances, the government was not entitled to summary judgment. As explained below, this Court should affirm the judgment of the court of appeals.

Petitioner's primary justification for the ban on possession of newspapers, magazines, and photographs in

LTSU Level 2 is the bald assertion that the ban will induce the worst inmates in the Pennsylvania corrections system to behave. In other words, because this categorical restriction on newspapers, magazines, and photographs makes LTSU Level 2 a less desirable place to live, inmates in the general population and special management units, who might otherwise commit terrible offenses in prison and who have proven undeterrable by any other means, might be dissuaded from breaking prison rules. By the same logic, DOC predicts that inmates committed to LTSU Level 2 will be motivated to obey the prison rules in order to be promoted to an environment with a larger selection of reading materials.

However, under *Turner v. Safley*, 482 U.S. 78 (1987), an unadorned assertion that a restriction will make a facility less desirable is not sufficient to establish the "validity" and "rationality" of the connection between the restriction and the asserted penological interest. *See id.* at 89. Were that sufficient, virtually any restriction would satisfy the standard. *Turner* requires more than superficial plausibility – it requires sound logic and some basis in fact. Thus, this Court should affirm the judgment of the court of appeals, which properly required under these circumstances that DOC demonstrate the connection based on evidence.

## ARGUMENT

It is "well established that the [First Amendment to the U.S.] Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (internal quotation marks omitted). Incarcerated persons retain that right, which includes reasonable access to books and periodicals. *See, e.g., Thornburgh*, 490 U.S. at 409-11 & n.9. In the corrections context, the Court has insisted that "[t]here must be a mutual accommodation between

institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

In *Turner v. Safley*, this Court formulated "a standard of review for prisoners' constitutional claims that is responsive *both* to the 'policy of judicial restraint regarding prisoner complaints *and* [to] the need to protect constitutional rights.'" 482 U.S. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)) (emphases added). *First*, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (internal quotation marks omitted). *Second*, a court should consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. *Third*, a court should consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* *Finally*, "the existence of obvious, easy alternatives" to the regulation "may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

But these principles do not answer the question presented: Is a state entitled to judgment as a matter of law upholding a prison restriction that bars the exercise of a core constitutional right if the state's only real justification for the restriction is a bald assertion that it will make part of the prison less attractive for inmates? The Third Circuit correctly applied all four *Turner* factors in a manner consistent with this Court's precedent and held that under these circumstances a state needs to submit *some* evidence in support of its justifications.

## I. *TURNER* REQUIRES EITHER AN OBVIOUSLY VALID AND RATIONAL NEXUS BETWEEN RESTRICTIONS OF RIGHTS AND THE ASSERTED PENOLOGICAL INTERESTS OR, ALTERNATIVELY, EVIDENCE OF A CONNECTION.

### A. *Turner* Requires More Than Bald Assertions That A Restriction Will Prevent Bad Behavior.

The *Turner* test first requires that courts examine whether the means-ends connection asserted by prison administrators is both "valid" and "rational." *See* 482 U.S. at 89. "Valid" and "rational" are not synonyms. Webster's defines "rational" as "based on reason." *Webster's Third New International Dictionary* 1885 (1986). By contrast, "valid" is defined as "able to effect or accomplish what is designed or intended," "strong," and "founded on an adequate basis." *Id.* at 2529-30. Thus, while logic alone can satisfy the *Turner* requirement that the connection be "rational," "validity" of the connection requires some basis in fact. *Cf. Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (proponent of expert testimony must establish a "'valid . . . connection'" to trial issue based on "factual basis, data, principles, methods, or their application").

*Turner* itself illustrated how courts are to apply the "valid" and "rational" components of the first *Turner* factor. There, the State of Missouri sought to justify an "almost complete ban" on prisoner marriages by asserting a security need to prevent "love triangles" and a rehabilitation interest in engendering self-reliance among female prisoners. *See* 482 U.S. at 97-98. The Court observed that "[c]ommon sense" did not establish as a matter of law a connection between the marriage restrictions and the prevention of "love triangles," *id.* at 98, and it questioned the logic of the connection to

rehabilitation. *Id.* Requiring something more persuasive, the Court scoured the trial record for evidence of a connection. *See id.* at 97-99. But it found that evidence insufficient and, therefore, struck down the offending regulation. *See id.* at 97 ("We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests."); *id.* at 98 ("We are aware of no place in the record. . . ."); *id.* ("Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal."); *id.* at 99 ("On this record . . . the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives."). This Court held that the marriage restriction swept "much more broadly," both logically and empirically, than could "be explained by [the government's] penological objectives." *Id.* at 98. By contrast, the Court concluded that Missouri's other challenged regulation – a ban on inmate-to-inmate correspondence – was "logically connected to" the state's articulated "legitimate security concerns" and also that "the *record clearly demonstrate[d]* that the regulation was reasonably related" to those interests. *Id.* at 91 (emphasis added).[5]

Petitioner is, therefore, only partially correct in its assertion that *Turner* requires a "'logical connection between the regulation and the asserted goal.'" Brief for Petitioner ("Pet. Br.") at 26. If such a connection is absent, Petitioner is correct that the restriction cannot stand. *See* 482 U.S. at 89-90 ("a regulation *cannot be sustained* where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational" (emphasis added)). However, *Turner* did not hold, as

5. Note that *Turner* reached the Supreme Court following a trial, and that the well-developed factual record informed the Court's discussion throughout. 482 U.S. at 82; *see generally id.* at 91-99.

Petitioner claims, that "prison officials need not produce evidentiary proof" in any case in which a regulation is challenged. A court also must determine whether the connection is "valid." *Id.* at 89.

Indeed, only in cases where the connection between regulation and penological interest has been obviously rational and valid has this Court required no evidence of the connection from the state. *See Harper*, 494 U.S. at 226 (noting "little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior");[6] *Block v. Rutherford*, 468 U.S. 576, 586 (1984) ("That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion."); *Wolfish*, 441 U.S. at 550-51 ("It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband. . . .").

*Overton v. Bazzetta* is entirely consistent with this analysis. In *Overton*, this Court upheld Michigan's rule restricting certain prisoners from having, among other things, certain children visit them in prison, because Michigan's stated goals were obviously valid and rational and supported by persuasive evidence. 539 U.S. at 133 (connection was "demonstrated by trial testimony."); *see also id.* at 129-30 (detailing evidentiary record supporting the government's case). This Court held that, on the extensive factual record before it, the prisoners in *Overton* failed to carry their burden of showing the invalidity of the connection at trial. *Id.* at 132. *Overton* did not involve a motion by the

6. Like *Turner*, the *Harper* decision also followed a trial, which provided much of the basis for the Court's analysis in that case. *See* 494 U.S. at 217.

government for judgment as a matter of law and did not speak to the Petitioner's contention here that it has no burden of *production* in support of its motion. The Court's statement in that case that the burden "is not on the State to prove the validity of prison regulations," *id.*, referred to the burden of persuasion at trial. *Id.* at 133. Nothing in that case or any other precedent of this Court required the courts below to grant DOC's summary judgment motion in this case on the basis of its assertions alone.

### B. Applying *Turner*, Courts of Appeals Have Required That The Connection To The Penological Goal Be A Matter of "Common Sense."

Courts of appeals, applying *Turner*, have carefully applied this Court's requirement that the nexus between the restriction and asserted penological interest be both valid and rational. Thus, the courts of appeals for the Second, Third, Ninth, and D.C. Circuits have followed an approach whereby if, and only if, the asserted connection is a matter of "common sense," the government need not submit evidence in support of the nexus. *See Walker v. Gomez*, 370 F.3d 969, 975 n.7 (9th Cir. 2004) (explaining burdens); *Waterman v. Farmer*, 183 F.3d 208, 217 (3d Cir. 1999) (Alito, J.) (prohibition on pornography bore common sense connection to rehabilitation of sex offenders); *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998) (same); *Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) (affirming summary judgment upholding prison policy). If, however, the connection is not conclusively established by common sense, the government must support its restriction on constitutional rights with evidence. *See Jacklovich v. Simmons*, 392 F.3d 420, 429 (10th Cir. 2004) (rejecting unsupported contention that "a four-month complete denial of access to constitutionally protected materials . . . furthers behavior management or rehabilitation"); *Shakur v. Selsky*, 391 F.3d 106, 115 & n.4 (2d Cir. 2004) (vacating dismissal); *Gomez*, 370 F.3d at 975 n.7 (explaining that prisoners

bear a "light" burden of rebutting common-sense of connection); *Asker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922-23 (9th Cir. 2003) (affirming summary judgment for prisoner); *Wolf v. Ashcroft*, 297 F.3d 305, 308-09 (3d Cir. 2002) (vacating judgment on the pleadings).

"Common sense" in this context has meant something more than "plausible" or "reasonable." In *Wolf v. Ashcroft*, the Third Circuit explained that the standard is "obviousness." 297 F.3d at 308-09. For example:

> A prohibition on inmate gatherings in prison common areas after 11-o'clock at night might have an obvious relationship to security concerns, as would a prohibition on publications that featured escape plans, *Amatel*, 156 F.3d at 206 (Wald, J., dissenting), or instructions on assembling weapons, *Giano v. Senkowski*, 54 F.3d 1050, 1059-60 (2d Cir. 1995) (Calabresi, J., dissenting). Likewise, the connection between the goal of rehabilitation and a ban on distributing sexually explicit magazines to "repetitive and compulsive" sexual offenders may well be . . . sufficiently obvious to be evaluated as a matter of common sense.

*Wolf*, 297 F.3d at 309. On the other hand, the government's assertion in that case that a prohibition on movies rated R or NC-17 in prison deters the general public from committing crimes was not so compelling as to be "a matter of common sense." *Id.* at 309; *see also Ramirez v. Pugh*, 379 F.3d 122, 129 (3d Cir. 2004) (common sense did not establish a connection between ban on publications featuring nudity and rehabilitation of non-sex offenders).

In these *Turner*-related cases, one theme has been clear: courts of appeals have been reluctant to credit unadorned

justifications by prison authorities in support of restrictions burdening constitutional rights. *See, e.g., Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996) (in the absence of evidence, the court is "reduced to speculation"); *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989) ("prison officials do not set constitutional standards by fiat"); *Williams v. Lane*, 851 F.2d 867, 886 (7th Cir. 1988) (Flaum, J., concurring in the result) (administrators may not "avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns").

### C. The Third Circuit's Analysis Is Consistent With This Court's Holdings In Other Circumstances Requiring Deference.

The analysis by the Third Circuit in *Banks* not only follows the consensus developed in the courts of appeals, but also is entirely consistent with this Court's decisions in other similar circumstances.

For example, in the context of federal habeas review of a state court's decision, this Court will defer to the state court unless the decision was contrary to or "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Using that standard, in *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), the Court undertook a careful analysis of a state's decision in light of the evidence set forth in the habeas petition. *Id.* at 2462-67. The Court overturned the state court's decision on the grounds that it was "objectively unreasonable." *Id.* at 2467.

This Court has performed similar analyses in reviewing administrative actions. Even the most deferential reviews

thereof call for a thorough examination of the analysis performed by the administrative agency. *See Chevron v. Natural Res. Council*, 467 U.S. 837, 844 (1984). In *Chevron*, the Court "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* The Court went on to explain, however, that federal courts are still charged with the obligation of analyzing the evidence presented in support of the regulation to determine whether the agency's decision was "arbitrary, capricious, or manifestly contrary to the statute." *Id.* In the same context, the Court has also held that "appellate counsel's *post hoc* rationalizations" are entitled to no deference at all. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Likewise, in the equal protection context, this Court has held that the government's stated interest cannot be taken at face value, but instead there must be a demonstrated connection between the claimed interest and the challenged provision. In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court rejected a lower court's articulation of a less deferential standard of review than rational basis, which the lower court had deemed necessary to protect citizens with mental retardation. *Id.* at 437-43. The Court stressed that the use of rational basis review to determine the constitutionality of regulations affecting the mentally retarded "does not leave them entirely unprotected." *Id.* at 446. It then carefully analyzed the state's evidence and held that the record did not establish a sufficient connection between the challenged provision and the government's stated interest. *Id.* at 448 ("Because in our view *the record does not reveal any rational basis* for believing

that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case." (emphasis added)).

In each of these areas of law, in which courts are called upon to defer to the judgment of another entity, this Court has fashioned reviews that are similar to what the courts of appeals have done in *Turner* cases – that is, defer to the entity as long as the judgment is obviously valid and rational, or a matter of common sense, but require proof through evidence if it is not. That is exactly what the Third Circuit did here.

## II. DOC HAS NOT ESTABLISHED A VALID AND RATIONAL CONNECTION BETWEEN THE BANS AND THE ASSERTED PENOLOGICAL INTERESTS.

In this case, the Third Circuit explained at length why Pennsylvania's articulated interest was not sufficient as a matter of common sense. For example, because commitment to and release from LTSU Level 2 is "not linked to any particular infraction or compliance," and inmates there "have not all been adjudicated by a hearing officer to have violated the DOC's rules," the court held that "it is unclear how the policy would achieve the deterrence it seeks." *Banks*, 399 F.3d at 141. Finding DOC's explanation illogical and unclear, the court turned to the evidentiary record, where it found "no evidence that the rule achieves or could achieve its stated rehabilitative purpose." *Id.* To the contrary, it observed that, according to some experts, studies, and court opinions, such a "ban may produce less rather than more compliance in at least some inmates":

> Rehabilitative goals are "furthered by efforts to inform and educate inmates, and foster their

> involvement in the world outside the prison gates." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985). In *Spellman v. Hopper*, there was testimony that deprivation of reading materials in segregation can cause "psychological deterioration" which in turn can cause inmates either to be "very withdrawn and curl up in infancy, or [to] become acting out and aggressive people." 95 F. Supp. 2d at 1281; *see also Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the "correlation between reading, writing and inmate rehabilitation").

*Banks*, 399 F.3d at 142 & n.9.

Next, the Third Circuit held that DOC's fire, contraband, and security justifications were also not established as a matter of law by common sense. *Id.* at 142-44. Particularly in view of DOC's numerous other regulations aimed directly at those potential prison hazards, the connection to the ban on newspapers, magazines, and photos was "too attenuated to be reasonable":

> [G]iven the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for the inmates to fuel fires, hurl waste, conceal contraband and create weapons. Under current regulations, each inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and

> three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used for the above purposes as effectively as a newspaper, magazine or photograph, and have been so used by LTSU Level 2 inmates.

*Id.* at 143-44; *see also id.* at 142 ("In fact, matches are not allowed in the LTSU."). For those reasons, and because there was "no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," *id.*, the court concluded that it could not "see how the DOC could reasonably have thought that the challenged policy . . . would meaningfully improve prison security by forbidding" an inmate even a single secular magazine, *id.* at 144.

### A. Common Sense Does Not Establish That The Worst Behaved Prisoners In Pennsylvania Will Be Motivated By The Selection Of Reading Material In LTSU Level 2.

This analysis notwithstanding, Petitioner continues to argue that the blackout of non-religious publications "encourages Level 2 inmates to improve their behavior" and "discourag[es] other inmates from behavior that could cause their assignment to Level 2." Pet. Br. at 13. In other words, the publications ban makes life worse in LTSU Level 2, so, logically, prisoners will modify their behavior to avoid the restriction. DOC argues that because this proposition is superficially rational, *Turner* requires the federal courts to defer to its decision-making authority and its expertise. *See id.* at 17.

However, it is difficult to conceive of a restriction of First Amendment rights that would not satisfy the "valid,

rational connection" requirement if all that is necessary is that prison officials assert that the restriction makes conditions more unpleasant for prisoners. The marriage ban struck down in *Turner* would pass that test. So would a blanket ban on family visitation, a ban on religious worship, a ban on speaking English, or a ban on reading or writing anything at all. Lower courts have, therefore, in accordance with this Court's precedent, required more before concluding that governments are entitled to judgment as a matter of law. *See, e.g., Jacklovich*, 392 F.3d at 429 (reversing summary judgment); *Shakur*, 391 F.3d at 115 & n.4 (vacating dismissal); *Ramirez*, 379 F.3d at 129 (same).

Moreover, as Petitioner has explained, LTSU was "designed to house those prisoners who are the 'worst of the worst,' . . . with the very worst behavioral histories in the prison system." Pet. Br. at 1. Level 2 is reserved for the "most incorrigible" and "recalcitrant" even among LTSU inmates. *Id.* at 4. These "prisoners . . . have engaged in or instigated riots, . . . are members of prison gangs, or . . . have a history of sexual predation." *Id.* They may "have an escape history, . . . a predilection for assaultive behavior with an intent to cause death or serious injury, or . . . otherwise present a serious threat to prison security." *Id.* at 3-4.

These are "'extremely disruptive, violent and problematic inmates'," *id.* at 6; they are the most "obdurate intractable prisoners" in the Pennsylvania corrections system, *id.* at 8. They have reached the "last stop on the disciplinary continuum" for prisoners who have effectively "'flunked out'" of all other "increasingly severe" housing units. *Id.* at 2-4. When they arrive at Level 2, they lose virtually all of

their remaining privileges – even as compared to Level 1[7] – as they become subject to severe restrictions on their movements, possessions, exercise, commissary privileges, telephone access, and visitation with family or friends. *Id.* at 4-6; J.A. at 33. They have not been deterred.

This Court should not accept without further inquiry Petitioner's assertion that these violent murderers, sexual predators, and prison gang members – undeterred at any step of the way in the Pennsylvania penal system – will be deterred from committing violent sexual and physical assaults or from attempting to escape by the paucity of reading material

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7. "Privileges afforded Level 2 inmates" are limited to: "(1) In cell activities; (2) In cell counseling services; (3) Employment as a unit janitor [if and only if no Level 1 inmate is available, *see* J.A. at 102 (table)]; (4) 1 Hour, 5 days per week of outside yard; (5) Recreational and legal law library services [no physical access to the library, *see id.* at 129]; (6) Legal and personal correspondence; (7) In cell religious visits by a Chaplain[]; (8) Three . . . showers per week; (9) One . . . visit, non-contact, immediate family only, per month; and (10) Emergency phone calls only once approved and verified by Unit Management Team." *Id.* at 32-33. On the basis of good behavior, an inmate may be promoted to "Level 1" where he is afforded "increased programming and privileges." *Id.* at 33. For example, a Level 1 inmate: (1) may have two visits a month, *id.* at 97; (2) may receive "any approved visitor," *id.* at 34, 97; (3) gains commissary privileges, *id.* at 33; (4) is entitled to one fifteen-minute phone call per month, *id.*; (5) may undertake in-cell study (G.E.D. and Special Education programs), *id.*; (6) may participate in programming in "substance abuse; anger/violence management; life skills; parenting skills; and effective emotional expression," *id.* at 44; (7) receives preference in employment decisions, *id.* at 102 (table); and (8) is eligible to have further additional privileges authorized at the discretion of prison administration, *id.* at 33. Typically, a large majority of LTSU inmates are assigned to Level 2. *Id.* at 130-31. The number of Level 1 inmates is "generally in the single digits." *Id.*

available in level 2. The bald statement that this purported deterrent might work on some small number of inmates does not, without more, entitle the government to judgment as a matter of law.

In *Thornburgh*, the Court explained that "[w]here . . . the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion," as it does in this case of a regulation very unlikely to have any constructive effect on all but a small number of prisoners, "a closer fit between the regulation and the purpose it serves may safely be required." 490 U.S. at 412. This is a textbook "exaggerated response": The burden on these inmates' First Amendment rights far exceeds the speculative benefit.

"Common sense" also does not establish a connection between the ban on newspapers, magazines, and photographs and the hope for improved behavior by those "worst of the worst" prisoners already in Level 2. As the court of appeals noted in this case, some experts hold the view that "deprivation of reading materials in segregation can cause 'psychological deterioration' which in turn can cause inmates either to be 'very withdrawn and curl up in infancy, or [to] become acting out and aggressive people.'" *Banks*, 399 F.3d at 142 n.9 (quoting *Spellman v. Hopper*, 95 F. Supp. 2d 1267, 1281 (M.D. Ala. 1999)).[8] On the other hand, "[r]ehabilitative goals are

8. *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting) (denial of First Amendment activity "may extinguish an inmate's last source of hope for dignity and redemption"); *Martinez*, 416 U.S. at 428 (Marshall, J., concurring) (observing that, "[i]f anything, the needs for identity and self-respect" promoted by preservation of inmates' First Amendment rights "are more compelling in the dehumanizing prison environment").

'furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates.'" *Id.* (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)); *see also Morrisson v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the correlation between reading and writing and inmate rehabilitation). One court noted that "[t]he simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, . . . nourishes the prisoner's mind despite the blankness and bleakness of his environment." *Wolfish v. Levi*, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. at 520. In sum, common sense does not establish, as a matter of law, that deprivation of reading material is likely to lead to improved inmate behavior.

### B. Common Sense Belies The Fire, Contraband, And Weapons Justifications.

Petitioner also asserts that "[t]he challenged restrictions . . . serve the goal of prison security . . . by reducing the opportunity to hide contraband and by withdrawing material that can be fashioned into crude tools or weapons or used to start cell fires." Pet. Br. at 27. However, the regulations at issue in this case do not restrict the amount of material available to the inmates, nor do they address the physical attributes of that material. Under like circumstances, lower courts have routinely rejected similar contentions as illogical. *Compare Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (rejecting fire and contraband justifications for a ban on bulk mail as "irrational" where the prison administration "already regulates the quantity of possessions that prisoners may have in their cells"); *Morrison*, 261 F.3d at 902 (concluding that it was "'irrational' to prohibit prisoners from receiving subscription for-profit mail on the

theory that it reduces fire hazards"); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) ("Because the jail has a no-smoking rule for inmates and because the jailers permit the inmates to have other forms of paper and similar materials, the official rationale seems tenuous at best."); *Spellman*, 95 F. Supp. 2d at 1274 (rejecting fire and contraband rationales as irrational); *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) ("Jail cells are already filled with an abundance of materials quite suitable for fire starting . . . ; yet no one suggests that cells ought to be stripped of bedding, clothing, toilet paper, writing materials, and so on.") *with Howard v. Snyder*, 389 F. Supp. 2d 589, 593-94 (D. Del. 2005) ("two boxes per inmate" rule had valid, rational connection to fire and contraband-prevention rationales).

Common sense does not establish these connections. As the court of appeals held in this case, they are, in fact, "too attenuated to be reasonable." *Banks*, 399 F.3d at 143. Because DOC did not offer any evidence in support of the contraband, fire, and weapons justifications, it was not entitled to judgment as a matter of law.

* * *

In the face of these assertions, it was perfectly appropriate for the court of appeals to look for evidence in the record. *See Turner*, 482 U.S. at 97-99. The "paucity of any such evidence . . . *reinforces* the conclusion" that the asserted connections are not valid or rational. *Banks*, 399 F.3d at 142 n.10 (emphasis added); *see also Shaw v. Murphy*, 532 U.S. 223, 231 (2001) (citing evidence that "[p]risoners have used legal correspondence as a means for passing contraband").

## III. PETITIONER'S REGULATION LEAVES NO ALTERNATIVE MEANS TO EXERCISE THE RIGHT IN QUESTION.

Petitioner advances several arguments in support of its claim, under the second *Turner* factor, that LTSU Level 2 offers inmates adequate alternative means to exercise the right in question. It is apparent, however, that the DOC's restrictions do not leave any alternative means to exercise these rights.

Effectively conceding as much, Petitioner attempts to redefine the First Amendment right at issue. That is, Petitioner contends that the right in question is not "'the right of access to a reasonable amount of newspapers, magazines and photographs,' but rather the right to receive information and communications from the outside world." Pet. Br. at 29-30.[9] Based on this redefined First Amendment right, Petitioner argues that legal consultations, limited communications with clergymen, monthly family visits, and "leisure books" from the prison library provide a reasonable alternative means of exercising the right:

> LTSU Level 2 inmates have ample alternative means of exercising that right: they are allowed monthly visits with immediate family, and unlimited visits from legal counsel; they receive daily visits [from] a Facility Chaplain; they may order books from the prison library; and they may send letters to and receive letters from family, friends and others, which may include newspaper or magazine articles with a personal connection to themselves.

*Id.* at 30.

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9. Note that this argument was not presented to the court of appeals. *See Banks*, 399 F.3d at 139 n.5 & 144 n.15.

This argument is a red herring. First, under the *Turner* analysis, "the right in question must be viewed reasonably and expansively." *See Thornburgh*, 490 U.S. at 417. In *Thornburgh*, for example, the Court upheld a censorship policy and explained that the restrictions were constitutional because they "permit[ted] a broad range of publications to be sent, received, and read.' *Id.* at 418. This Court was "comforted by the individualized nature of the determinations required by the regulation" because "no publication" could "be excluded unless the warden himself ma[de] the determination that it [wa]s 'detrimental to security, good order, or discipline of the institution or . . . might facilitate criminal activity.'" *Id.* at 416. The Court warned that "[a]ny attempt to achieve greater consistency" than could be achieved in case-by-case censorship might "run afoul of the second *Turner* factor, *i.e.*, the presence or absence of 'alternative means of exercising the right' in question." *Id.* at 417 n.15; *see also Wolfish*, 441 U.S. at 551 (examining existence of "alternative means of obtaining reading material").

That reasoning is consistent with First Amendment decisions outside of the prison context, where this Court has always held that the right to information and ideas is a right to receive *specific* information and ideas. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality) (discussing "regime of voluntary inquiry" in school library); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (discussing union president's "right to speak and the rights of the workers to hear what he had to say"). For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court explained that

"the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482.

Here, Petitioner has, for all practical purposes, stopped the flow of certain "core" First Amendment information, including politics and current events, to these prisoners altogether. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) ("the discussion of governmental affairs . . . is at the core of our First Amendment freedoms"). Properly understood and "reasonably" construed within the meaning of *Thornburgh*, *see* 490 U.S. at 417, the right to information and ideas cannot, therefore, be satisfied by periodic legal consultations, daily spiritual advice, and monthly family visits. DOC's restriction, therefore, cannot be sustained on the basis of this record.

## IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PRISONERS' FIRST AMENDMENT RIGHTS CAN BE ACCOMMODATED AT A *DE MINIMIS* COST TO THE PETITIONER, WHICH CAN ACHIEVE ITS GOALS BY ALTERNATE MEANS.

For the reasons stated by the court of appeals, DOC's ban on newspapers, magazines, and photographs in LTSU Level 2 likewise fails under the third and fourth *Turner* factors, reinforcing the conclusion that the ban is an "exaggerated response."

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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